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ATTORNEYS FOR
JULIA DURWARD, individually and
as a member of Ginger Mountain Lodge LLC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

(San Jose Division)

In re:

EDDIE PASCUA BATOON and
FLORA LLANES BATOON,

Debtors.

Case No. 23-50592

CHAPTER 7

**NOTICE OF MOTION TO DISMISS
COMPLAINT PURSUANT TO
FED.R.CIV. 12(b)(1) OR
ALTERNATIVELY COMPEL
ALTERNATIVE DISPUTE
RESOLUTION AND STAY ACTION,
DISMISS FOR IMPROPER VENUE
PURSUANT TO FED.R.CIV. 12 (b)(3),
OR DISMISS FOR FAILURE TO STATE
A CAUSE OF ACTION PURSUANT TO
FED.R.CIV. 12 (b)(6)**

**FED.R.BANK.PROC 7012 (B)
STATEMENT**

Hearing Date: October 31, 2023

Hearing Time: 1:30 p.m.

Hearing Location:

Courtroom 9

Via Video/Teleconference

Hon. Stephen L. Johnson

Adversary Proceeding No. 23-05022

EDDIE PASCUA BATOON and
FLORA LLANES BATOON,

Plaintiffs,

v.

JULIA DURWARD, as an individual and
Member of Ginger Mountain Lodge LLC,
and DOES 1 TO 10,

Defendants.

COME NOW, JULIA DURWARD, individually and as a member of Ginger Mountain Lodge LLC (“Durward” or “Movant”), and moves to dismiss the Complaint (Doc#1) pursuant to Federal Rules of Civil Procedure 12 (b)(1) or alternatively compel alternative dispute resolution and stay action, to dismiss for improper venue pursuant to FRCP 12 (b)(3), or dismiss for failure to state a cause of action pursuant to FRCP 12 9b)(6) (“Motion”)¹ as follows:

I. Summary of Motion.

The Complaint must be dismissed pursuant to FRCP 12 (b)(1), and Federal Rules of Bankruptcy Procedure 7012 (b) or alternatively compel alternative dispute resolution and stay action, dismissed for improper venue pursuant to FRCP 12 (b)(3), or dismissed for failure to state a cause of action pursuant to FRCP 12 (b)(6).²

The Motion is based on a provision of Ginger Mountain Lodge, LLC’s (“Ginger Mountain”) Operating Agreement which provides for resolution of deadlocked matters via a binding ‘tie-breaker’ procedure (aka alternative dispute resolution).

Movant submits the statutory basis for the Motion can be based on FRCP 12 (b)(1) or (3) or (6) and is therefore based on all three sections, but better based on FRCP 12 (b)(1) (see *Geographic Expeditions, inc. v. Estate of Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010)).

II. Procedural Background.³

On June 4, 2023 Plaintiffs commenced a Chapter 11 bankruptcy proceeding (In re Batoon, U.S.B.C. (CA ND) Case #23-50592 (“Main Case”). On July 27, 2023 Plaintiffs commenced this adversary proceeding with the filing of the Complaint (“Complaint”) (“Adversary Proceeding”).

On August 27, 2023 Durward file a Motion To Dismiss (Doc#8) which is set for hearing on the same date/time as this Motion. This Motion supplements and parallels that motion.

III. The Court Has Authority to Grant the Motion.

Pursuant to FRCP 12(b), made applicable by FRBP 7012 (b), provides, in pertinent part:

¹“Fed.Rules.Civ.Proc.”, of “Fed.R.Civ.” or “FRCP” means the Federal Rules of Civil Procedure.

²“Fed.Rules.Bankr.Proc.” or “FRBP” means the Federal Rules of Bankruptcy Procedure.

³A bankruptcy court may take judicial notice of its own records, as well as the records of other courts in related matters. (Fed.Rules.Evid. 201; *In re Meltzer*, 516 B.R. 504, 506 n.2 (Bankr. N.D. Ill. 2014); *SG & Co. Northeast, LLC v. Good*, 461 B.R. 532, 535 n.3 (Bankr. N.D. Ill. 2011)).

1 “(b) How to Present Defenses. Every defense to a claim for relief in any pleading
2 must be asserted in the responsive pleading if one is required. But a party may assert
3 the following defenses by motion:

4 (1) lack of subject-matter jurisdiction . . .

5 (3) improper venue . . .

6 (6) failure to state a claim upon which relief can be granted . . .”

7 As noted hereinabove, this Motion is based on FRCP 12 (b)(1), (3), and (6), but Movant
8 believes it is better based on FRCP 12 (b)(1) (see (see *Geographic Expeditions, inc. v. Estate of*
9 *Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010)).

10 **A. Judicial Notice is Proper on a Motion to Dismiss.**

11 A bankruptcy court may take judicial notice of its own records, as well as the records of other
12 courts in related matters. (Fed.Rules.Evid. 201⁴; *In re Meltzer*, 516 B.R. 504, 506 n.2 (Bankr. N.D.
13 Ill. 2014); *SG & Co. Northeast, LLC v. Good*, 461 B.R. 532, 535 n.3 (Bankr. N.D. Ill. 2011)).

14 On a motion to dismiss the court may take judicial notice of facts outside the pleadings
(*Mack v. South Bay Beer Distribs*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

15 **IV. The Complaint Must Be Dismissed, or At Least Stayed Pending Resolution of the**
16 **Alleged Deadlock Between And Among the Members of Ginger Mountain Through**
17 **a Binding Dispute Alternative.**

18 The Complaint alleges a deadlock between and among the members of Ginger Mountain, but
19 omits to attach the Operating Agreement and fails to mention that the Operating Agreement provides
20 for a binder alternative dispute method for deadlocks.

21 The Complaint (Complaint, page 2, lines 13-16) alleges:

22 “This is an action to resolve or recover ownership of debtors’ property . . . , to avoid
23 a fraudulent conveyance, and to recover on debtors’ claims that belong to their
24 bankruptcy estate, and is therefor a core proceeding under 28 U.S.C. §157, so
25 jurisdiction and venue is appropriate in this bankruptcy court.”

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27 //

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4“Fed.Rules.Evid.” or “FRE” means Federal Rules of Evidence.

1 The Complaint also alleges:

2 “20. There exists an actual controversy between the parties concerning their
3 respective rights and duties because plaintiff contends that Julia Durward should not
4 have any control or right to receive any proceeds in the sale of the real property
5 known as Sky Lake Lodge, 2644 16 Lake Tahoe Boulevard, South Lake Tahoe,
6 California, which defendant disputes.

7 21. Alternatively, the contract of sale of the real property known as Sky Lake Lodge,
8 2644 Lake Tahoe Boulevard, South Lake Tahoe, California was made by the lawful
9 act of the managing member of the legal owner of the property, as registered with the
10 California Secretary of State, and cannot be opposed, objected to or interfered with by
11 defendant, which defendant disputes. “ (Complaint, page 5, paragraphs 20-21)⁵.

12 The Ginger Mountain Operating Agreement⁶ provides for a resolution of anticipated
13 deadlocks between the members of Ginger Mountain. Specifically, Article V Management and
14 Control of the Company, subsection 5.3 (e) provides:

15 “The Members recognize that, given initial makeup of the membership interests,
16 the possibility of a deadlock may exist. Therefore, the Members agree that for so
17 long as the membership interests are such that a deadlock could arise, if a majority
18 of the Members cannot agree upon a material issue affecting ownership,
19 management, or operation of the business of the Company, they will submit the
20 matter for review to a neutral and mutually acceptable “tie breaker” who is familiar
21 with the Company’s business. The decision of such tie breaker shall be final and
22 binding on the members and become the decision of the Company. If the Members
23 are unable to agree upon a tie breaker, the deadlock will be resolved by binding
24 mediation through JAMS or some other mutually agreed upon mediation forum as
25 mutually agreed-upon by the Members.”

26 Therefore, the Complaint must be dismissed, or alternatively stayed pending resolution of the
27 alleged deadlock between and among the members of Ginger Mountain through a binding dispute
28

26 ⁵See also Complaint, i.e. paragraphs 26-28, 37-45, and prayers A and B.

27 ⁶A copy of an Operating Agreement is referenced in and attached to the Notice of Removal in
28 another Adversary Proceeding before this court, Case No. 23-05016, Doc#1, page 72-93). See
also Request For Judicial Notice, Exhibit A.

1 alternative. The court must compel such compliance, or dismiss the Complaint pursuant to FRCP 12
2 (b)(1), (2), and/or (6).

3 **A. Plaintiffs Cannot Deny Their Shared Membership in Ginger Mountain.**

4 Plaintiffs' schedules specifically confirm they only own 50% of the membership interests in
5 Ginger Mountain. Specifically, Debtors' Schedule A/B (Doc#1, page 22 of 62) states:

6 "42. Interests in partnerships or joint ventures (name of entity . . . % of ownership . . .
7 current value of portion you own . . . Ginger Mountain Lodge LLC 50.00 %
8 \$925,000.00"

9 Absent from Plaintiffs' schedules is any assertion that they owned or own 100% of Ginger
10 Mountain. Plaintiffs cannot switch positions for the purposes of the Complaint.

11 Judicial estoppel is an equitable doctrine invoked by a court at its discretion and prohibits a
12 party from assuming contrary positions simply because their interests have changed. (*New
Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

13 **V. Conclusion.**

14 The Motion must be granted as to the Complaint, and/or each cause of action therein.

15 Dated: August 28, 2023

LAW OFFICE OF WILLIAM J. HEALY
16 /s/ William J. Healy
William J. Healy

17 **FED.R.BANK.PROC 7012 (B) STATEMENT**

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19 FRBP 7012 (b) provides "Applicability of Rule 12(b)–(i) F. R.Civ.P. Rule 12(b)–(i)
20 F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall include a statement that
21 the party does or does not consent to entry of final orders or judgment by the bankruptcy court".

22 JULIA DURWARD, individually and as a member of Ginger Mountain Lodge LLC
23 ("Durward"), hereby states that she does not consent to final orders or judgment by the bankruptcy
24 court.

25 Dated: August 28 2023

LAW OFFICE OF WILLIAM J. HEALY
26 /s/ William J. Healy
William J. Healy